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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. A-146

WILLIAM B. ALLEN

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Attorney for Petitioner:

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Memphis, Tennessee 38119

QUESTIONS PRESENTED

1. Was the Sixth Circuit (Judges Edwards, Keith and Special Judge Edward H. Johnstone) correct in holding that the former president of a corporation which underwent Chapter XI proceedings, was foreclosed upon pursuant to Bankruptcy Court order and whose assets were sold at public auction, could not under Section 8(a)(1)(3) and (5) of the N.L.R.A. begin a new business enterprise without adopting the labor agreement of the bankrupt, defunct company and making good Teamster Health, Welfare and Pension contributions required thereunder, which were discharged in bankruptcy, or otherwise be personally liable for the payment of same?

2. Does a Bankruptcy Court authorized liquidation, foreclosure and sale of all assets of a business constitute a bona fide discontinuance of business for purpose of applying the alter ego theory of liability under the N.L.R.A.?

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OPINIONS DELIVERED IN THE CAUSE BELOW:

Petitioner, William B. Allen, was found to be in violation of Sections 8 (a)(1)(3) and (5) of the National Labor Relations Act by an N.L.R.B. Administrative Law Judge in his Decision of September 24, 1982, by failing to make contributions to the Teamsters' Health, Welfare and Pension Fund pursuant to the terms

of a labor agreement between the Teamsters and Allen Materials, Inc., Debtor-In-Possession under Chapter XI of the Bankruptcy Act. The ALJ Decision was adopted by the Board in its Order of August 26, 1983. Named as Respondents along with William B. Allen personally, were two now defunct corporations named Allcon, Inc., and Allen Concrete, Inc. This Petition is being filed on behalf of William B. Allen only as these last two named entities no longer exist.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. Grounds for the appeal included, among other things, the denial that the Petitioner was operating as a disguised continuance of Allen Materials, Inc., Debtor-In-Possession. The Sixth Circuit Court of Appeals affirmed the Order of the Board in its Opinion dated April 8, 1985, which granted enforcement of the Board's Order and Decision reported at

252 N.L.R.B. 1116 (1980), finding the Petitioner and Allcon, Inc., and Allen Concrete, Inc., in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act.

The Petitioner filed a Petition for Rehearing En Banc with the Sixth Circuit and on May 29, 1985, the Sixth Circuit Court issued a directive to the N.L.R.B. requiring them to file a response to the Petition for Rehearing no later than June 6, 1985. Thereafter the Petition was denied by Order dated June 18, 1985.

By order of this Court dated August 21, 1985, an extension of time to file the Petition For Writ of Certiorari was granted to and including October 1, 1985.

The Opinion of the Sixth Circuit Court is attached hereto as Appendix A and bears docket numbers 83-5784 and 83-5933.

JURISDICTION

The date of the Judgment of the

United States Court of Appeals for the Sixth Circuit was April 8, 1985. Petition for Rehearing was denied on June 18, 1985, after response by N.L.R.B. was required as set forth heretofore. Extension of time to file for Writ of Certiorari has been extended to October 1, 1985, as stated above.

The statutory provision conferring jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

There is no controversy regarding the facts. Approximately ninety percent of the testimony in the record was from William B. Allen, Petitioner, and there is no dispute between the parties as to what happened, but only as to the legal significance of the facts.

Allen Materials, Inc., was a corporate Debtor-In-Possession under Chapter XI of the Bankruptcy Act which case was commenced in 1978 in the Western District of Tennessee and at the time this company was a party to a Teamster labor contract. At the termination of this case an Order was entered by the U. S. Bankruptcy Court, Exhibit D hereto, on July 14, 1981, authorizing the Union Planters National Bank of Memphis to foreclose on all assets and stock shares of ownership which had been pledged by the company, which then closed its doors and its president, William B. Allen, Petitioner, was discharged from his job by the Bank and all assets were sold off at public auction.

Allen then attempted to begin anew in business by incorporating a new firm known as Allcon, Inc., whose only similarities to Allen Materials, Inc., aside from his last name, was that Allcon kept one of the two thousand customers of the

defunct business and engaged in ready-mix cement operations, which was one of five different product lines the defunct business engaged in. Allen told a few of the former drivers of the old company that they could work for Allcon if they were needed but that this company would be non-union. Allen's lawyer drew up the charter for Allcon by copying the old charter for Allen Materials, Inc. However, it is undisputed that the two corporations had little in common. As noted by the ALJ at Tr. page 230: "You have elicited from Mr. Allen already, Mr. Leffler, that Allen Materials, Inc., was a much broader based company than the ones he is now running. And that the one he is now running doesn't do much of the kind of business that the former companies do... I don't think anyone so far...on the General Counsel's side has disputed that."

Allcon stayed in business about

six months and closed for lack of business and because it could not pay its unemployment tax claims. Bill Allen then attempted a second new company called Allen Concrete to do contracting work on residential sidewalks, patios and driveways. This business lasted one month and closed due to lack of customers. The old Allen Materials, Inc., was never in this product line.

During the Chapter XI, the Teamsters filed claims in Bankruptcy for approximately $90,000.00 for unpaid contributions to their Teamster Health, Welfare and Pension Fund. These were discharged in bankruptcy, and Allen Materials, Inc., was therefore relieved from paying same as a matter of law.

The Teamsters responded to the Bankruptcy discharge by commencing this case on July 23, 1981, just nine days after the Bankruptcy Court allowed Allen Materials, Inc., to be liquidated, by the filing of unfair labor practice

charges with the N.L.R.B. against Allcon for refusing to adopt the old Allen Materials, Inc., union contract.

Although Allcon was without dispute a corporation, the charges were amended on August 24, 1981, to name William B. Allen individually, and subsequently his second new business of Allen Concrete, Inc., was also named, following the business failure of Allcon.

It was alleged that Allen personally was a disguised continuation and "alter ego" of the bankrupt company and that himself and both the new companies, which stayed in business only briefly, had violated Sections(8)(1),(3), and (5) by not adopting the earlier contract.

According to this Court, the alter ego theory of liability cannot apply if there was a bona fide discontinuation of Allen Materials, Inc., as opposed to a merely technical change in the ownership of a business for the sole purpose of

evading a union contract. N.L.R.B. v. Southport Petroleum Co., 315 U.S. 100 (1942).

We are before this Court now because we think it is readily apparent that when a business is involuntarily foreclosed upon as a result of bankruptcy proceedings and all assets sold, the president's stock certificates seized and himself fired, and the company ended, that such should be legally regarded as a bona fide discontinuance of business.

The N.L.R.B. ALJ who heard the above facts ruled that Allen was a disguised continuance of the bankrupt Allen Materials, Inc., and so did the Sixth Circuit panel (Edwards, Keith and Johnstone).

We note that an interesting thing occurred upon our Petition to Rehear En Banc. The Court directed the N.L.R.B. to file a response to the Petition (Appendix B) before denying the same (Appendix C).

The Decision and Order of the Board also found William B. Allen, personally, and the two other respondents, both very small, now defunct, ready-mix cement operations to be both the successors under the Board's successorship doctrines to the bankrupt and foreclosed Allen Materials, Inc., and also found Allen, personally, and the same two small operations named as respondents as the alter ego or "disguised continuance" of the non-existent Allen Materials, Inc.

The Sixth Circuit in its said Decision of April 8, 1985, ruled that Bill Allen, personally and the small businesses known as Allen Concrete and Allcon were disguised continuances of the bankrupt Allen Materials, Inc., or stated differently, that Allen Materials, Inc., labor relations obligations under its Teamster contract survived liquidation and bankruptcy and must ultimately be borne by Bill Allen himself. No mention was made in the

Decision as to certain other issues raised, such as the effect of discharge in bankruptcy or lack of jurisdiction over respondents due to the size of the entities involved.

We, therefore, assume that the only ruling which that Court issued and for which we now seek redress pertains to the question of "disguised continuance of business" versus "bonafide discontinuance of business", which is the crux of the alter ego issue.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT AND ARGUMENT

(1) The Court of Appeals Decision herein conflicts with a Decision of this Court.

(2) The Court of Appeals has decided an important question of Federal Law which has not been but should be decided by this Court.

Sixth Circuit Judges Edwards, Keith and Special Judge Edward H. Johnstone in

an Opinion recommended for full publication have ruled that an individual cannot begin anew after the total collapse, bankruptcy, foreclosure, liquidation and sale to unrelated third parties of a former business of which he was the president (until terminated at the time of foreclosure), without personally owing any and all debts of the former business to the Teamsters, which were discharged in bankruptcy, and without being personally responsible for continuing obligations to recognize and bargain with the Teamsters even though he is no longer in business.

The Decision is contrary to this Court's Decision in Southport Petroleum Co., vs. N.L.R.B., supra, and further contains no discussion nor any application of Sixth Circuit law on the subject whatsoever.

The Decision of Judges Edwards, Keith and Johnstone differs from the Board's decision in that the Board found Mr. Allen personally to be both a successorship entity

to the old Allen Materials, Inc. and an alter ego entity as well. The Court's Decision differs in that it has found him to be an alter ego but not a successorship entity.

We are therefore grateful for the apparent sound decision of the Sixth Circuit that Mr. Allen is not a successorship entity and also say that this Court needs to look closely at whether he is an alter ego of the old bankrupt company as well.

The criteria adopted by the Sixth Circuit to implement the Southport Petroleum decision of this Court and to determine if one company is the alter ego of another company is whether the two enterprises have "substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership." Nelson Electric, supra, p. 968, citing Crawford Door Sales Co., Inc. 226 N.L.R.B. 1144 (1976).

In other words, two operations must be compared and it must turn out that they are substantially identical in order for the alter ego theory to apply.

The purpose of these guidelines is get at the crux of the alter ego problem, that is, to find whether there has been a "bona fide discontinuance and true change in ownership" as opposed to a "disguised continuation of the old employer". Southport Petroleum, supra at p. 106, and N.L.R.B. vs. Herman Bros. Pet Supply, Inc., 325 F.2d 69 (CA. 6, 1963).

A review of alter ego cases will readily show that the theory has never been applied where a business has been declared bankrupt and has had all of its assests including its stock (which evidence its ownership) foreclosed upon and sold. Alter ego cases typically involve a company which has not changed at all in its essentials, but has merely attempted to rid itself of labor relations obligations

by either changing its name or ownership to some party closely related to the past owners. Herman Bros., supra, is an excellent example, where there was a sale of assets to the brother and son of its president, which was considered by the circuit not to be bona fide. The chief point which we would bring to the Court's attention is that there has been no consideration given to the bona fide nature of the ending of the old business and the beginning of a new enterprise. The alter ego theory requires an element of intent as indicated by the cases cited. In other words, the idea in ending the old buisness has to be the purpose of starting a new enterprise without a Union. The central problem which no one who has thus far looked at this case has been willing to understand, is that you do not take a very large successful business enterprise and get it into a situation where it can't pay its debts and is required to file Chapter XI and is eventually foreclosed

upon and sold off at auction in a way that is not bona fide.

The primary fact about the Sixth Circuit Decision which convinces us that the panel did not understand that they were supposed to determine whether there was a bona fide discontinuance of Allen Materials, Inc., is brought home by the fact that nowhere in the Decision is the word "foreclosure" mentioned.

We say that it is not possible to write a decision which holds that there was not a bona fide discontinuance of Allen Materials, Inc., and at the same time say anything about there being an involuntary foreclosure. Since the most important part of our case, the foreclosure sale, was not mentioned in the Decision, we respectfully refer your Honors' attention to Appendix D to this Petition, which is a copy of Mr. Allen's Exhibit 3 at the hearing, the Bankruptcy Court Order lifting stays and authorizing foreclosures. We regret that

this has been given no consideration thus far and which we say drastically affects the voluntariness and bona fide-ness of the discontinuance of Allen Materials, Inc.

As we have pointed out, the alter ego theory pertains to a single business which remains the same but is subject to a change created by its own doing, which is designed to improperly rid itself of Union obligations.

The Nelson Electric case, supra, sets out factors to look at to determine whether both the old, Allen Materials, Inc., and the new companies and Bill Allen personally, are really one in the same. In addition to the foregoing and serious problems with the panel decision, we distressingly find that the Nelson Electric case, the leading case on the subject in the Sixth Circuit, was not even mentioned by that Court.

Also, sadly lacking is any meaningful analysis or comparison between Allen Materials, Inc., and the individual and

small companies which are held to be its alter egos.

If we are to determine the result in accord with Southport Petroleum and the Sixth Circuit case of Nelson Electric then it necessarily appears that such comparative analysis is required and if the Sixth Circuit had performed such it would look like this, according to the undisputed evidence in the record:

I. Comparison of "Management", "Ownership" and "Supervision"

A. Allen Materials, Inc., (1939 - June, 1981, liquidated per Court authorized foreclosure. (TR. 174, 422-423, Rx - 3).

1. Bill Allen, President and stockholder, (TR. 81-85)

2. Pernie Allen, stockholder. (TR.81)

3. William B. Allen, Jr., stockholder. (TR. 82-83)

4. Richard S. Allen, stockholder. (TR. 82-83)

5. James M. Allen, stockholder. (TR. 82-83)

6. John M. Allen, stockholder. (TR. 82-83)

7. Don Sammons, stockholder and Executive Vice President (no relation to Allen family) (TR. 82)

8. George Parker, Vice-President. (TR. 84)

9. Sarah Anthony, Vice-President. (TR. 84)

10. Others including: secretary, treasurer, controller, Vice-President of Operations, Vice-President of Sales, Vice-President of Administration.

11. Superintendents of Block Plant, Superintendent of Sand & Gravel Operations.

12. Fleet Master

13. Supervisor of Order Center; supervisors of Warehouse, Block Plant, Repair Shop & Yard.

14. Clerical Staff.

B. Allcon, Inc. (June, 1981 to March, 1982, closed due to tax claims). (TR. 144-14

1. Bill Allen, who was President, General Manager, clerical worker and manual laborer - no formal stockholders). (TR. 120-122)

2. E. L. Dye and Earl Mize, supervisors of grand total of 5-6 employees. (TR. 149)

C. Allen Concrete, Inc., (existence confined to March, 1982 - closed for lack of business; chartered as a corporation but not open long enough to become a going business). (TR. 30

1. Bill Allen, President and General Manager (No other management or employees). (TR. 142.)

II. Comparison of "Business", "Purpose", "Operations", "Customers" and Equipment"

A. Allen Materials, Inc.,

This firm was a corporation which evolved over a period of many decades from four family companies started by Bill Allen's father, S. G. Allen. These were: Allen Ready Mix Co., Allen Sand & Gravel Co., Allen Concrete Block Co., and Allen Building Materials Co., which together formed through merger Allen Materials, Inc., covering a broad range of construction and building materials products and services including ready-mixed concrete, sand and gravel dredging and production, concrete block production, sale of building and housing materials, It was the largest such firm in Memphis, Tennessee. It also furnished data processing and computer services to merchants and maintained a 4-bay vehicle repair shop for maintenance and overhaul of heavy trucks. (TR. 167,183,184,211)

Specific figures for comparison are:

Total employees: approximately 150 (TR.181)

Total sales: to $7,000,000.00 (TR. 182)

Customers: 2,000 during Chapter XI, only one of which went with Allcon after the bankruptcy. (TR. 224)

1. Ready Mix Division

Sales: to $3,500,000.00 during Chapter XI. (TR. 184, 200)

Trucks: 55 (TR. 102-104,158-159)

Drivers: 55 to 75 (TR. 185)

Production: to 250,000 cubic yards during Chapter XI per year. (TR. 181)

Locations or branches: 5 total, including "portable" plants. (TR. 175-177,84-85

2. Sand & Gravel Division

Sales: $500,000.00 annually (TR.203)

Location: Company owned lake on 390 acres in Memphis, upon which company dredges operated. (TR. 204)

3. Concrete Block Division

Production: 3,000,000 to 5,000,000 blocks annually.

Employees: 10-15, including 4-5 Teamster drivers. (TR. 191, 202)

4. Building Materials Division

Location: 25,000 square foot company-owned warehouse. (TR. 193).

Inventory: $500,000.00 to $750,000.00. (TR. 19

Sales: to $1,000,000.00 annually during Chapter XI. (TR. 193)

Products: Construction materials of all types and refrigerators, stoves, dishwashers, ranges, cabinets, roofing materials, including distributorships for Westinghouse and Home Brick Company. (TR. 196)

Employees: 5-7, including supervisor and foreman. (TR. 194)

5. Data Processing Division

Sales: $120,000.00 annually during Chapter XI. (TR. 218, 219)

Employees: 2-3. (TR. 214)

Products: Computer time and services. (TR. 213)

B. Allcon

Business as compared to Allen Materials, Inc.,

Trucks: 6 (all leased. (TR. 124-127)

Customers: Grand total of 9 in six months, not 2,000 such as Allen Materials, Inc., had. Only one of the nine was a former customer of Allen Materials, Inc., (TR. 105-106, 223, GCx4, TR. 355).

Sales: Grand total in six months of $150,000.00 to $160,000.00, as compared to $7,000,000.00 per year for Allen Materials, Inc.,. (TR. 199-200)

Employees: 7-8 as compared to 150. (TR. 267-270)

Operations: as compared to Allen Materials, Inc.,: (TR. 196)

a. Ready Mix Concrete - Yes.
b. Sand and Gravel - No.
c. Concrete Blocks - No.
d. Building Materials - No.
e. Data Processing - No.

C. Allen Concrete

Business: Same as Allcon except for also repairing residential sidewalks, driveways and patios. (TR. 367-

Operations: as compared with Allen Materials, Inc.: (TR. 196)

a. Ready Mix Concrete - Yes.
b. Concrete contracting -
Allen Concrete: Yes;
Allen Materials, Inc.: No.
c. Sand & Gravel - No.
d. Concrete Blocks - No.
e. Building Materials - No.
f. Data Processing - No.

Employees: None, as compared with 150 for Allen Materials, Inc. (TR. 37

Sales: Negligible, as compared with $7,000,000.00 annually for Allen Materials, Inc.

Place of business: None, except Bill Allen's house.

Duration: 1 month or less.(TR. 107)

Trucks: None.

D. Bill Allen, personally

Business: Record does not reflect that he has operated anything as a sole proprietorship or has even had any employees. He is currently a traveling salesman. Yet he is

> personally responsible for all the Allen Materials, Inc., old union contract debts?

It is readily apparent from the foregoing analysis that: (1) Allen Materials is not "substantially identical" to Allcon; (2) Allen Materials is not "substantially identical" to Allen Concrete and (3) Allen Materials is not "substantially identical" to Bill Allen, an individual.

We ask the Court what is there in this record which constitutes substantial evidence that Bill Allen meets the requirements to be an alter ego of Allen Materials, Inc. Is it the fact that his last name is involved? How about the fact that he was president of Allen Materials? That only fulfills the "management" and "ownership" tests if all the drastic differences in management and ownership are ignored.

What of the fact that Allen may or may not have violated Section 8(a)(1) of the

Act by telling a small number of former Allen Materials' drivers that Allen Materials was bankrupt and foreclosed upon but that they could work for Allcon and that Allcon was going to be non-union? If that statement puts Allcon in violation from the start of 8(a)(1), does that resolve the other issues? Does that constitute substantial evidence that Allen Materials' bankruptcy, foreclosure, sale and liquidation were not bona fide, but were created as a subterfuge to rid the company of the Union? We suggest that such a statement standing alone is not illegal, absent the fact that Mr. Allen is otherwise obligated to adopt the old contract. Stated differently, if he is not an "alter ego" of the bankrupt company, then he doesn't have to adopt the Union contract and it cannot be improper for him to make such a statement, in the context of this case. The result would doubtless be

different in the context of a union election campaign at the time or an organizing attempt, which was not the case. In other words, he cannot violate the old contract by saying his company is non-union if in fact he has no contract at that point.

Can such a statement also stand as a substitute for evidence that the former Allen Materials and Allcon and Allen Concrete and Bill Allen are one in the same? Can it stand in place of evidence that Allcon, Allen Concrete, and Bill himself had the same ownership, management, operation, equipment, and customers as Allen Materials, or has the alter ego theory now been discarded and personal liability for the former president of a bankrupt now been adopted as a kind of punishment for failing in business and a way to revive old debts and get around the otherwise recognizable defense of discharge in bankruptcy? We would urge the Court that the panel below has embarked the law on a dubious course by

allowing for what is probably the first time the N.L.R.B. to resurrect ex post facto a debt which has been discharged in bankruptcy.

To read the Opinion one would think that no changes in the scope or nature of the business occurred. One would learn that Allen Materials, Inc., was in a Chapter XI case, but not what happened to it. One would never know from the Opinion that a complete liquidation occurred, that the Petitioner was fired and told to leave (Tr. 264), and that a Court ordered foreclosure occurred and public auction of assets.

The Opinion relies on the fact that the powers and purposes clause of the Charter for Allcon was copied from and therefore read the same as Allen Materials, Inc. The Petitioner called his attorney, John R. Dunlap, who drew up the Allcon charter to testify regarding the formation of the company. The transcript at Pages

299-308 reflect the attempts made by the undersigned to question Mr. Dunlap on these matters and the treatment the Petitioner received thereon from the ALJ. These pages show that virtually all questions on any matter asked was objected to and sustained by the ALJ and Mr. Dunlap was effectively denied the opportunity to testify.

The Opinion is based on some badly inaccurate statements. The Opinion says that "according to the testimony of three witnesses", Allen told the drivers that the company was "going to be up under another name".

The transcript shows that one person said that (Albert Wiggins, TR. 328), while of the two other Union witnesses, one was not present at the subject discussion (M. D. Merriweather, TR. 320), and the other (Jesse Sykes, TR. 285), did not say what the Opinion attributed to him. He said (TR. 285) that Allen told the drivers "the bank had foreclosed him and that he was bankrupt...and that he had opened another

ready-mix company...and that we could continue to work for him if we wanted to...but this company would be non-union and that he would try to get us in the group insurance with the supervisors...".

The transcript shows that the Opinion writer further incorrectly quoted what Allen said at his meeting with the drivers when it was held that "Allen told the men they were welcome to continue working for the new company, even though a lawyer had advised that he fire all of them." We believe the transcript will show that the part concerning the lawyer's advice did not take place at the meeting with the drivers.

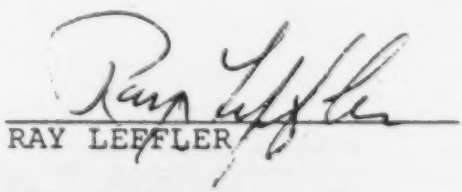
CONCLUSION

We would suggest that the Court should decide just when the obligations of a bankrupt, foreclosed business end under a Union contract. If they do not end when a firm's assets including its stock ownership are seized and foreclosed upon at the conclusion of a Chapter XI, then everyone

should be entitled to know clearly, because under the ruling we have there can be no end, no new start for a person unfortunate enough to be in these circumstances and nothing but continuing harassment and attempted seizure by the Board of his house and car to satisfy the old Teamster debt. If nothing else, we should be entitled to an opinion which forthrightly deals with the problem of how you can be the alter ego of something that was foreclosed upon and sold off at public auction.

We request that the Writ be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been furnished by United States Mail this 30th day of September, 1985, to the following:

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RAY LEFFLER

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 83-5784, 83-5933

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. WILLIAM B. ALLEN, ALLCON, INC. and ALLEN CONCRETE, INC., *Respondents.*	ON APPLICATION For Enforcement and Cross Petition to Review An Order of The National Labor Relations Board.

Decided and Filed April 8, 1985

Before: EDWARDS* and KEITH, Circuit Judges; and JOHNSTONE, District Judge.**

EDWARDS, Circuit Judge. Respondent William B. Allen is the son of S. G. Allen who founded a construction company in Memphis in 1939 and then added a small ready-mix concrete plant to supply his contracting needs and then developed a substantial building and supply company with expanded ready-mix operations. These operations were organized into

* Honorable George Edwards took senior status January 15, 1985.

** Honorable Edward H. Johnstone, United States District Court for the Western District of Kentucky, sitting by designation.

APPENDIX "A"

four closely-held corporations and they were merged in 1972 into Allen Materials, Inc.; the shareholders of which were S. G. Allen, his wife Pernie Allen, and his son William. S. G. Allen died in 1975 leaving his stock to the four children of his son William.

From the 1950's, the employees of the Allens' various companies were represented by Teamsters Local 984. At peak, the Local represented 75 employees of the Allens. These were covered by collective bargaining agreements which dated back to 1969.

In 1978, Allen Materials, Inc. filed for reorganization under Chapter XI of the Bankruptcy Act. Thereafter, the business was operated as Allen Materials, Inc., Debtor-in-Possession ("AMIDIP"). In March of 1980, AMIDIP renewed its collective bargaining agreement with Teamsters Local 984. The term of the agreement was from March 1, 1980 to March 1, 1983.

On June 26, 1981, Respondent William Allen called a meeting of at least seven drivers who were then employed by AMIDIP. According to testimony of three witnesses found consistent and credible by the ALJ, Allen told the drivers that the Company was bankrupt, that it was "going to be up under another name," and that the new company would be non-union. He stated his desire to hire five and, ultimately, ten drivers. According to the testimony of driver Jesse Sykes, Allen told the men they were welcome to continue working for the new company, even though a lawyer had advised that he fire all of them. He allowed that seniority would be retained, but declared that he "want[ed] no parts of the Union anymore." ALJ Opinion at 6; Tr. 317-319, 327-328, 363-364.

On July 1, 1981, Allen chartered the new company, Allcon, Inc. The NLRB quotes the charter as reciting that Allcon was "to engage in production, sale and delivery of ready-mix concrete, building materials, concrete blocks, sand and gravel, and to offer data processing services" (i.e. the identical services which the prior company, AMIDIP, offered). Respondents

respond that this language was mere "boilerplate" and that Allcon never engaged in anything more than a substantially scaled down ready-mix operation. Although Allcon paid its drivers the same wage scale they were earning at AMIDIP, Allcon refused to abide by the collective bargaining agreement with AMIDIP and would not recognize the Union.

In April 1982, Allen incorporated Allen Concrete, Inc., whose charter authorized it "to make, produce, process, transport, package, store, buy and sell ready-mix concrete, building materials, concrete blocks, sand and gravel" and to carry out related activities. According to Respondents, Allen Concrete, Inc. consisted of William Allen as president and general manager and a partnership comprised of Allen, E. L. Dye and Earl Mize, both former supervisors of both AMIDIP and Allcon. Respondents describe Allen Concrete, Inc. as a company without employees. It exists, they say, merely to supply ready-mix concrete for driveway/patio construction work done by the partnership, which uses only contract labor. At the time of the hearing, Allen Concrete, Inc. had not issued stock. It listed its office as the same Moriarty Road site where Allcon operated. However, Respondents state in their reply brief that the corporation is now operated out of William Allen's home.

The Teamsters petitioned the NLRB for relief from William Allen's refusal to bargain with them on the ground that the company currently operated by Allen is the alter ego of the predecessor corporations.

The case was heard before an ALJ who held that under the facts and the law, the present Respondents are alter egos for the original contracting entities.

The ALJ's opinion said in part:

> It would seem that the requisites of an *alter ego* or successorship relationship between Respondents and their nominal predecessor party to the subsisting collective agreement here – which Respondents continue totally

> to ignore and claim in no way affects their operations — are met in the instant case. Thus, as found above, William B. Allen continues to be the common strand, linchpin, principal, operator, and guiding star of the business, as well as each of the "enterprises," in question; and, although that business has, after its expansion, undergone a contraction to its earlier proportion, it continues to be a ready-mix concrete business, conducted in the same manner, at one of its same locations, under the same supervision, with the same unit employees and customers — although, to be sure, not as many. All of this has taken place without hiatus in operations. Under these circumstances, it is clear that the subsisting collective agreement cannot simply be "shucked off," cast overboard, and ignored through the device of creating a succession of new corporations with somewhat different names.

ALJ Opinion at 8.

The ALJ then found that the Respondents were liable for the unfair labor practices alleged by the Union on the basis of the alter ego doctrine and recommended a bargaining order.

Our review of this record confirms the findings of fact by the ALJ and the Board. The facts herein represent an alter ego case. *See Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100 (1942). There the refinery was the subject of an NLRB order to cease and desist from engaging in certain unfair labor practices. The refinery did not comply. After considerable delay, it entered into a stipulated obedience agreement, but three days later the refinery company (a Texas corporation) liquidated and a new Delaware corporation was formed. The Board sought enforcement against the Delaware corporation and the Fifth Circuit Court of Appeals granted it. The Supreme Court (Jackson, J.) affirmed, saying:

> Implicit in the reinstatement provision of the Board's order was a condition of the continued operation by the

> offending employer of the refinery to the employment of which the illegally discharged employees were to be restored. Such operation might have continued under the old business form or under a disguise intended to evade this provision. If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for compelling obedience. Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear, and accordingly is a question of fact properly to be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted.

315 U.S. at 106 (footnotes omitted).

We grant enforcement of the Board's order.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U. S. POST OFFICE & COURTHOUSE
CINCINNATI, OHIO 45202

May 29, 1985

Mr. Joseph Frankl
Mr. Gerald P. Fleischut

RE: Case Nos. 83-5784/5933 - National Labor Relations Board v. William B. Allen, et al.

Gentlemen:

This is to advise that the court directs you to file a response to the respondents' petition for rehearing en banc in the above case. This response is to be delivered in the clerk's office no later than 5:00 P.M. Thursday, June 6, 1985.

Very truly yours,

s/JOHN P. HEHMAN
John P. Hehman
Clerk

pe

cc: Mr. W. Bruce Swain
Mr. Ray Leffler

No. 83-5784/5933

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUNE 18 1985

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WILLIAM B. ALLEN, ALLCON, INC., & ALLEN CONCRETE, INC.
Respondents

ORDER

BEFORE: KEITH, Circuit Judge, EDWARDS, Senior Circuit Judge, and JOHNSTONE*, U. S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the

APPENDIX "C"

petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, CLERK

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*Hon. Edward H. Johnstone, sitting by designation from the Western District of Kentucky.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

ALLEN MATERIALS, INC.,

Debtor, BK-78-20202

IN RE:

S. G. ALLEN COMPANY, a
Tennessee General Partnership,

Debtor, BK-78-21550

UNION PLANTERS NATIONAL BANK
OF MEMPHIS,

Plaintiff, ADVERSARY NO 81-1021

v.

ALLEN MATERIALS, INC., and
S. G. ALLEN COMPANY,

Defendants.

FILED
JUL 14 1981
BANKRUPTCY JUDGES
Western District of TENN.

ORDER LIFTING STAYS AND AUTHORIZING FORECLOSURE

This matter came on to be heard on the 14th day of July, 1981, upon the Complaint to Lift Stays and to Authorize Foreclosures filed by Union Planters National Bank of Memphis (hereinafter "Bank"), upon the defendants' Answer

to Complaint to Lift Stays and Authorize Foreclosures, upon statements of counsel for plaintiff and defendant and upon the entire record, from all of which it appears that the plaintiff holds a first lien security interest, which has been duly perfected, on all of the non-real property of Allen Materials, Inc., and holds a first lien deed of trust on the real estate owned by S. G. Allen Company; that the Bank is the sole outside creditor of Allen Materials, Inc.; that the defendants have relinquished actual and constructive possession of all of their assets to the plaintiff and the plaintiff has commenced foreclosure proceedings under its Security Agreement with Allen Materials, Inc., and under its Deed of Trust with S. G. Allen Company, which is scheduled to be held on July 28, 1981; that there is no equity in the property of the two defendants that would inure to the

benefit of general unsecured creditors; that the automatic stays should be lifted and the foreclosure authorized.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the automatic stays be and they are hereby lifted and terminated and the plaintiff be and it is hereby authorized and permitted to foreclose pursuant to its security interest and the lien of its deed of trust and any surplus funds shall be paid to the respective estates.

s/DAVID S. KENNEDY
David S. Kennedy, United States Bankruptcy Judge

DATE: 7-14-81

APPROVED:

ROSENFIELD, BOROD & KREMER, P. C.

BY: s/J. RICHARD ROSSIE
J. Richard Rossie, Attorneys for Plaintiff

s/ R. HUNTER HUMPHREYS
John R. Dunlap, Attorney for Defendants

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

WILLIAM B. ALLEN,
ALLCON, INC., and ALLEN CONCRETE, INC 1/,
Respondent,

and Case No. 26-CA-9219

TEAMSTERS LOCAL UNION NO. 984,
AFFILIATE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
Charging Party.

Jack L. Berger and John Goree, Esqs.,
Memphis, TN, for NLRB General Counsel.
Ray Leffler and W. BRuce Swain, Esqs.
(Messrs. Brackhahn, McNeil, Swain & Hughes, Attorneys) and Mr. William B. Allen, Memphis, TN, for Respondents.
Mr. Arthur B. Crutcher, Memphis, TN, for Charging Party.

DECISION

I. Preliminary Statement; Issues

OHLBAUM, Judge:-This proceeding 2/ under the National Labor Relations Act as amended, 29 U.S.C. Sec. 151 et seq. ("Act"), was litigated before me in Memphis, Tennessee, on May 20-21 and June 15-17, 1982, with all parties participating by counsel or other representative and afforded full opportunity to present evidence, contentions,

proposed findings and conclusions, and briefs received by August 13, 1982. Record and briefs have been carefully considered.

The principal issues are whether Respondent Employers violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with Charging Party Union under a subsisting collective agreement, discontinuing required fringe and benefit payments required thereby, and refusing to abide by or honor the terms and provisions thereof; instead informing employees that it henceforth "would operate non-union" notwithstanding said collective agreement, and proceeding to do business under a succession of newly formed corporations with a variety of names; thereby also violating Section 8(a)(3) and (1) of the Act by discriminating against employees to discourage them from Union membership and lawful concerted activities under the act, and interfering with, restraining and coercing them in their exercise of rights under Section

includes the usual provisions covering such subjects as hours of work, seniority and fringe benefits, and it requires payments into union-administered health and welfare and pension funds. It contains a union dues checkoff provision. It also provides (id. p. 13, Art. XXIX, Sec. 1):

> "This Agreement shall be binding upon the parties hereto, their successors and assigns. In the event an entire operation is sold, transferred or taken over by sale, transfer, assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement during its term."

It is conceded that Allen Materials, Inc., Debtor-in-Possession, continued to operate under that agreement (Trial transcript, p. 77).

Jesse C. Sykes, a former ready-mix truckdriver for 14 years (1967-81) for Alllen Materials, Inc. and Allen Materials, Inc., Debtor-inPossession, Albert Wiggins, another such driver for the same companies for 18 or 19 years (1963-81), and M. D. Meriweather, still another such truckdriver

for 24 years (1958-82), all Union and bargaining unit members, testified credibly and without contradiction that on or around June 26, 1981 William B. Allen called a meeting of the seven company truckdrivers, with manager Richardson and dispatcher Martin there 9/ in the Company dispatch office, where Allen told them that the Company was bankrupt, that the "company /is/ going to be changed, and going to be up under another name. . . . /I don't/ know exactly what name it /is/ going to be under," but that "it will be a non-union"; that he "needed five drivers to work for him if /you/ want/ed/ to," with the expectation that he would go to ten trucks and ten truckdrivers; that the drivers could "continue to work for/me/ if /you/. . . want/ed/to, although /my/ lawyer had advised /me/to "terminate/d/all of /you/ . . . /get/ rid of /of you/," but that the new company would be "nonunion," with "no pensions," but "seniority would stay as it was"; and that "/I am/ going

non-Union. /I don't/ want no parts of the Union anymore." Wiggins and Merriweather continued to work for Allen in his new corporate form(s), out of the same Moriarity Road location, until around early 1982, with, in some cases, the same trucks as before, their work being unchanged from before, under the same supervision, and at the same pay (but without health and welfare and pension benefits).

B. Discussion and Resolution

General Counsel's contention is that, under the described circumstances, Respondents have violated Section 8(a)(5), (3), and (1) of the Act persistingly through the series of new corporations formed.

That the circumstances described and found would, if not punctuated by the new corporations, constitute violations of the Act as alleged, is not open to doubt. 10/ The existence of a valid and subsisting 1980-83 collective agreement is unchallenged, as are its violation

and the refusal of Respondents to adhere to or be bound thereby in any respect, leaving the sole basic remaining question to be whether they were sound as alter egos or successors.

The Board and courts have described the requisites of an alter ego or of a successorship relationship sufficient to justify a carryover of the obligations under a collective labor agreement with a predecessor. Significant elements have been said to be whether the "new" business is substantially the same, in whole or in part; whether the "new" business has its own labor contract with another union; whether the product or services are the same; whether the location is the same; whether the same equipment is used; whether there is a continuity of workforce; whether the jobs are substantially the same; whether supervision is the same; and whether there was an hiatus in operations. 11/ That a diminution in operations, as here, is consistent with a successorship, see

N.L.R.B. v. Fabsteel Company of Louisiana, 587 F. 2d 689, 695 (5th Circ. 695), cert. denied, 442 U. S. 943 (1979):

> "This Board has long held, with court approval, that under proper circumstances, the obligation to bargain with an incumbent union may be found although the work force is considerably diminished by the transfer. /Citations/"

As also stated in J. M. Tanaka Construction, Inc. v. N.L.R.B., F 2d, 110 LRRM 2296, 2299 (9th Cir. 1982), also a case involving attempted evasion of paying fringe benefits required under a collective agreement:

> "An alter ego relationship may exist when only a portion of an enterprise is purportedly transferred to a new owner. /Citations/... Nor is the balance shifted by testimony that /Respondent/ uses primarily asphalt rather than concrete, and does a smaller percentage of its work on government contracts."

A "continuity of operation across the change in ownership" -- even assuming arguendo that there has occurred a real change of ownership here-- requires at least recognition of and bargaining with

the incumbent union (Wiley v. Livingston, 376 U.S. 543; 1964), whether or not the substantive obligations of the labor agreement continue to bind the successor (N.L.R.B. v. Burns International Security Services, Inc. et. al., 406 U. S. 272; 1972); but where the "subsequent" employer is but a disguised continuation (albeit at a scaled-down level, cf. Fabsteel, supra) or alter ego of the "predecessor" employer, even the substantive contractual obligations carry over (Crawford Door Sales Company, Inc. 226 NLRB 1144 /1976/) and the "subsequent" employer may even be held accountable for the "predecessor's" unfair labor practices, particularly if an alter ego thereof (Atlantic Paper Company & ano., 1121 NLRB 125; 1958)

It would seem that the requisites of an alter ego or successorship relationship between Respondents and their nominal predecessor party to the subsisting collective agreement here--which Respondents continue totally to ignore and claim in

no way affects their operations--are met in the instant case. Thus, as found above, William B. Allen continues to be the common strand, linchpin, principal, operator, and guiding star of the business, as well as each of the "enterprises," in question; and, although that business has, after its expansion, undergone a contraction to its earlier proportion, it continues to be a ready-mix concrete business, conducted in the same manner, at one of its same locations, under the same supervision, with the same unit employees and customers--although, to be sure, not as many. All of this has taken place without hiatus in operations. Under these circumstances, it is clear that the subsisting collective agreement cannot simply be "shucked off," cast overboard, and ignored through the device of creating a succession of new corporations with somewhat different names.

In the ready-mix concrete supply business, the amount of business depends, of course, on the extent of customer calls for the concrete company's product. The need for concrete-mix truckdrivers therefore waxes and wanes with the number of ready-mix concrete orders to be delivered--as was the case also with Respondent's various "predecessors" including Allen Materials, Inc. The collective agreement here does not require that the employer employ a certain number of employees, but only that when employees in the categories included in the collective agreement are hired they be regarded as within the unit and thus subject to the provisions of that agreement. While Respondents are currently, at any rate for the time being, conducting a considerably scaled-down enterprise compared to Allen Materials, Inc. (which had included various nonunion operations in addition to the ready-mix concrete operation to which Respondents' activities

may be limited; in this connection, however, cf. n. 8 supra), it undeniably continues to conduct a ready-mix concrete supply and delivery business, arguably not trivial or inconsiderable, with employees clearly within the categories covered by the subsisting collective agreement of its predecessors Allen Materials, Inc. and Allen Materials, Inc., Debtor-in-Possession. As already indicated, mere dimunition in size of an operation--particularly where, as here, the number of employees contracts and expands dependent upon the need--does not free a successor (nor, of course, an alter ego) from the obligation of a subsisting labor agreement. Fabsteel, supra; Tanaka, supra. Here, with of course full knowledge of the subsisting collective agreement which he himself had negotiated and signed, Respondent Allen has, without hiatus in operations, formed a succession of corporations under the same ownership, management, and, in part, location, employees, and customers as Allen Materials, Inc. and

customers as Allen Materials, Inc. and Allen Materials, Inc., Debtor-in-Possession, with the avowed purpose and intention, as credibly and without contradiction established by testimony of a number of long-term employees, of operating "non-union" and thereby attempting to evade or avoid the obligations of the subsisting collective agreement and to refuse to bargain with the Union--the latter an obligation even in the absence of a collective agreement. Whether this succession of corporate creatures of Allen be dubbed "successors" or "alter egos" is of no real consequence here in assessing the continued viability of the collective agreement, and of Respondent's statutory obligation to bargain with the Union, with respect to the ready-mix concrete truck drivers (and others of the bargaining unit) who continued in their employ without hiatus.

If the original named employer in the collective agreement had continued in business and had cut back its operations in the manner and to the extent and location here, it would

unquestionably have continued to be bound, pro tanto to its collective agreement with the Union. Thus, in regard to obligations under the collective agreement, Respondents are in essentially no different position than if Allen's original corporation had retrenched and reduced its operations to the point at which they now are, since there is no obligation under the collective agreement to employ a certain number or minimum number of employees, but only to utilize Union members for such work as there may be, to the extent covered by the collective agreement. Since such a retrenchment or reduction in the size of operations would not have in itself provided an escape from the obligations of the collective agreement, the mere fact that the reduced Allen business has changed names or has undergone a series of chameleonlike corporate metamorphoses has resulted in no greater or lesser obligation under the subsisting collective agreement. Spawning a succession of

corporate children in rapid-fire fashion in order to slough off a collective bargaining agreement (and the statutory bargaining obligation even absent such an agreement) may hardly be considered to promote that industrial peace designed by the framers of the Act, as is attested by their inclusion of Section 15 (infra) among its provisions. Cf. e. g., Golden State Bottling Co., Inc. vs. N.L.R.B., 414 U. S. 168 (1973); J. M. Tanaka Construction, Inc. vs. N.L.R.B.,, F. 2d , 110 LRRM 2296 (9th Cir. 1982); N.L.R.B. v. Cablevision Systems Development Co. & ano., F. 2d, 109 LRRM 3102 (2d Cir. 1982); N.L.R.B. v. Fabsteel Company of Louisiana, 587 F. 2d 689 (5th Cir. 1979), cert. denied, 442 U. S. 943 (1979); International Technical Products Corp. et al., 249 NLRB 1301, 1303-4 (1980); P.A. Hayes, Inc. and P. H. Mechanical Corp., 226 NLRB 230 1976); Johnson Ready Mix Co., 142 NLRB 437, 441-442 (1963).

As stated in Cablevision, supra, at 3104:

> ". . . .the relevant comparision is not between the specific operations involving the union members. The 'essential inquiry is whether operations, as they, impinge on union members, remain essentially the same after the transfer to the new employer." (Citations)

It remains only to consider the effect, if any, of the bankruptcy proceeding upon the instant proceeding.

Section 15 of the Act provides:

> "Wherever the application of the provisions of /the U. S. bankruptcy statutes/ conflicts with the application of this /National Labor Relations/ Act, this Act shall prevail: Provided, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect."

Although in its Answer and in the initial stages of the instant trial Respondent insistently maintained that this proceeding was stayed and of no effect by reason of the pendency of the aforedescribed bankruptcy proceeding of "Allen Materials, Inc." (supra), it is clear as a matter of law that this is not so, as explicitly provided by 11

U.S.C.A. Sec. 362 (b)(4). 12/

Where the principal of a bankrupt continues the business under a new name, even a

> "bankruptcy court's order allowing /him/ to purchase . . . assets free of all liens, claims, and encumbrances cannot affect the Board's order. . . . To find otherwise would . . . be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority . . . .to proceed against a successor-employer in furtherance of that obligation." (International Technical Products Corp and its Successors and Assigns, 249 NLRB 1301 /1980/.)

See also: Golden State Bottling Company v. N.L.R.B., 414 U. S. 168 (1973); N.L.R.B. v. Baldwin Locomotive Works, 128 F. 2d 39, 43-44 (3d. Cir. 1942); N.L.R.B. v. Bachelder (receivership), 120 F.2d 574 (7th Cir. 1941), cert. denied, 314 U. S. 647 (1941); Nathan Yorke, Trustee in Bankruptcy, Successor. . . or Alter Ego to the Seeburg Corporation & ano., 259 NLRB No. 105, 109 LRRM 1029 (1981), Burgmeyer Bros., Inc., 254 NLRB 1027, 1028 (1981); Allen Materials, Inc., Debtor-in Possession, 252 NLRB 1116 (1980);

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Where the principal of a bankrupt continues the business under a new name, even a

> "bankruptcy court's order allowing /him/ to purchase . . . assets free of all liens, claims, and encumbrances cannot affect the Board's order. . . . To find otherwise would . . . be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority . . . .to proceed against a successor-employer in furtherance of that obligation." (International Technical Products Corp and its Successors and Assigns, 249 NLRB 1301 /1980/.)

See also: Golden State Bottling Company v. N.L.R.B., 414 U. S. 168 (1973); N.L.R.B. v. Baldwin Locomotive Works, 128 F. 2d 39, 43-44 (3d. Cir. 1942); N.L.R.B. v. Bachelder (receivership), 120 F.2d 574 (7th Cir. 1941), cert. denied, 314 U. S. 647 (1941); Nathan Yorke, Trustee in Bankruptcy, Successor. . . or Alter Ego to the Seeburg Corporation & ano., 259 NLRB No. 105, 109 LRRM 1029 (1981), Burgmeyer Bros., Inc., 254 NLRB 1027, 1028 (1981); Allen Materials, Inc., Debtor-in Possession, 252 NLRB 1116 (1980);

International Technical Products Corp. et al, 249 NLRB 1301, 1303-4 (1980); P. A. Hayes, Inc. and P. H. Mechanical Corp. (assignment for benefit of creditors), 226 NLRB 230 (1976); Transmarine Navigation Corporation and Its Subsidiary, International Terminials, Inc., 170 NLRB 389 (1968), remanded, 380 F. 2d 933 (9th Cir. 1967). But cf. In re Bildisco, F. 2d ,110 LRRM 2954 (3d Cir. 1982).

Whether or not Allen Materials, Inc. (or Allen Materials, Inc., Debtor-In-Possession) has or has not--and there is no evidence here that it has--been discharged in bankruptcy of its obligations under the collective agreement in question , is a matter apart from the questions, here presented, of whether Respondents, as alter egos or successors, are, under the circumstances shown, bound thereby, and further, independently thereof, under statutory obligation under the Act--even in absence of any collective agreement--

to bargain with the Union. In this connection, it is to be noted that the Board's final order in Allen Materials, Inc., Debtor-in-Possession, 252 NLRB 1116 (1980), explicitly required Respondent to cease and desist from refusing to bargain with the Union and from "repudiating or reneging" on collective agreements with the Union, as well as to make contributions and payments to the Union's health and welfare and pension funds (id at 1123); and that that order by its terms extends to that Respondent's "officers, agents, successors, and assigns" (id at 1116).

We are not here concerned with the enforcement of remediation 13/ of the alleged unfair labor practices, but only as to whether they occurred. For the reasons indicated above, under the circumstances described, it is determined that they did in fact occur as alleged in the third amended complaint. The question of remediation thereof is one

to be addressed in compliance or enforcement proceedings.

Finally, inclusion of William B. Allen as a Respondent, as well as within the compass of the remedial Order, is warranted, since he continues to be the central thread of the necklace of corporate beads which he has created here. He concedes that he "personally exercise/s/ all the functions of all the officials in the Respondent companies here" (Trial transcript, p. 265). Cf. e. g., Concrete Mfg Co., et al, 262 NLRB No. 92, 110 LRRM 1353 (1982); Carpet City Mechanical Company, Inc., 244 NLRB 1031, 1034 (1979); Henry I. Siegel Co., Inc., & ano., 172 NLRB 825, 838-40 (1968), enforced, 417 F. 2d 1206 (6th Cir. 1969), cert. denied, 398 U. S. 959 (1970). 14/

It is accordingly, found and determined that the Respondents have, as alleged in the third amended complaint, violated and continue to violate Section 8(a)(5),(3),

and (1) of the Act.

Upon the foregoing finddings and the entire record, I state the following:

IV. Conclusions of Law

A. Jurisdiction is properly asserted in this proceeding.

B. Through announcing to employees on or about June 26, 1981, that theneeforth their operations would be non-union, and that employees could continue to work for them only on that basis, and in fact since that time continuing to operate on that basis, Respondents have interfered with, restrained, and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1), of the Act, and continue to do so, as alledged in paragraphs "13" and "21" of the third amended complaint.

C. Through refusing to make fringe and benefit payments to employees under a subsisting March 1, 1980-March 1, 1983 collective labor agreement with the Union, Respondents have discriminated and continue

to discriminate against employees in regard to hire and tenure of employment and terms and conditions thereof to discourage membership in a labor organization, thereby violating Section 8 (a) (3) of the National Labor Relations Act; and have, further, interfered with, restrained and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1), of the Act, and continue to do so, as alleged in paragraphs "14," "15," and "22" of said complaint.

D. Through failure and refusal, since on or about July 10, 1981, to recognize or bargain collectively with Charging Party Union as exclusive bargaining representative of employees in an appropriate bargaining unit, by repudiating and refusing to be bound by or adhere to the terms of the subsisting March 1, 1980-March 1, 1983 collective agreement with said Union, and through refusing since then to make fringe and benefits payments under the terms of

said collective agreement, Respondents have failed and refused, and continue to fail and refuse, to bargain collectively with the representative of their employees, in violation of Section 8(a) (5) of the Act, and have thereby further interfered with, restrained and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a) (1), of the Act, and continue to do so, as alleged in paragraphs "14," "20," and "23" of said complaint.

The appropriate bargaining unit, referred to above, is:

> All production and maintenance employees at Respondents' Memphis, Tennessee, facility, excluding all office and clerical employees, watchmen, guards, and professional employees, technical employees, and supervisors as defined in the Act.

E. The foregoing unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and

enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

V. Remedy

Respondents having violated the Act in the respects described, should be required to cease and desist from those or further violations, and, in view of the seriousness of the violations, going to the "very heart" 15/ of the Act's purposes and its cornerstone guarantee, by absolutely refusing to have any dealings with employees' bargaining representative as well as the noncompliance with a former order of the Board in a previous proceeding against Allen Materials, Inc., Debtor-in-Possession (supra), should also be required to cease and desist from in any way violating employees' right under the Act. 16/ Respondents should also be required to recompense Charging Parby by making the fringe and pension payments required by the subsisting 1980-83 collective agreement with regard to the Union unit members who have worked, are working or will work thereunder, and

to observe and give effect to the other terms and provisions thereof. In view of the staccato formation of corporations and other enterprises by Respondent William B. Allen, he should also be required to cease and desist from continuing to form such enterprises for the purpose of attempting to evade and escape from the obligations of the aforementioned collective agreement or to attempt to avoid and escape from the statutory bargaining obligation under the Act. 17/

Sums due, with interest, should be calculated as explicated by the Board in F. W. Woolworth Company, 90 NLRB 289 (1950), Isis Plumbing & Heating Co., 138 NLRB (1962), and Florida Steel Corporation, 231 NLRB 651 (1977).

Finally, the usual information Notice to Employees should be required to be posted.

VI.

Upon the foregoing findings of fact,

conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, there is hereby issued the following: 18/

ORDER

IT IS HEREBY ORDERED that Respondents William B. Allen, Allcon, Inc., and Allen Concrete, Inc., and their respective officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Informing employees, in violation of Section 8(a)(1) of the Act, that the business operations of any of Respondents, or of any alter ego or successor to any of Respondents, will be conducted on a non-union basis, or that employees continuing in any such employ would be permitted to do so only a non-union basis.

2. Failing and refusing to adhere to and apply the terms and provisions of the collective agreement made and entered into on March 31, 1980, for a period of three years from March 1, 1980 to March 1, 1983,

by and between Teamsters Local Union #984, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, and Allen Materials Co., including, but not limited to, the provisions thereof requiring payment of health and welfare and pension benefits.

3. Failing or refusing to recognize and bargain collectively in good faith with the aforementioned Union as the exclusive bargaining representative of the employees in the following appropriate collective barbaining unit:

> All production and maintenance employees at Respondents'Memphis, Tennessee, facility (currently located at 7810 Moriarity Road, East Memphis, but also all other locations in or around Memphis, Tennessee, to which it may be removed or expanded), excluding all office and clerical employees, watchmen, guards, professional employees, technical employees, and supervisors as defined in the Act.

4. Forming, creating or utilizing any business enterprise, in corporate or other form, to which any property or goodwill

in any form is transferred or shifted, or otherwise for the purpose of attempting to evade or avoid the employer's obligations under the aforementioned collective agreement, or to attempt to defeat, impair or render burdensome the enjoyment and enforcement of the rights of said unit employees or their collective bargaining representative thereunder.

5. In any other manner interfering with, restraining, or coercing employees in the exercise of their right of self-organization; to form, join, or assist any labor organization; to bargain collectively through representative of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

B. Take the following affirmative actions, necessary to effectuate the policies of the Act:

1. Notify said Union in writing,

within ten (10) days from the date of this Order, that the recognitiion of said Union as exclusive bargaining representative of the aforesaid collective bargaining unit is acknowledged and confirmed for all purposes under the collective agreement effective March 1, 1980-March 1, 1983.

2. Adhere and give effect to said agreement in accordance with its terms and provisions.

3. Upon request, bargain in good faith with said Union as such exclusive bargaining representative, retroactively as of the date when Respondents or any of them ceased, failed, or refused to recognize or continue to recognize and bargain with said Union; and, if requested, embody in a signed agreement or agreements any understanding reached.

4. Applying the provisions, terms and conditions of said collective agreement retroactively as aforesaid (except to the extent it may be duly modified by valid

written agreement with said Union), make whole said Union, as well as all members of the aforesaid bargaining unit, for all sums and benefits (including reimbursement for any medical or other expenditures incurred by reason of any discontinued premiums or payments) due thereunder, including but not limited to health and welfare fund and pension fund payments and contributions stipulated thereunder, plus interest, computed in the manner described in the "Remedy" portion of the decision of which this Order forms a part.

5. Preserve and upon request make available to the Board or its agents for examination and copying, all corporate and personal books, records, entries, and papers of whatsoever description, all payroll periods, job records, social security payment records, timecards, personnel records and reports, accounts receivable records, checkbooks and checkstubs, bank statements, tax records, leases, deeds,

bills of sale and all other records, documents and entries necessary or useful to determine any sums, payments, or benefits due under and the extent of compliance with the terms of this Order.

6. Post at their premises at 7810 Moriarity Road, East Memphis, Tennessee (as well as at any and all other premises in the Memphis and nearby area at or from which they may be doing business), copies of the attached Notice marked "Appendix" 19/ Copies of said Notice, on forms provided by the Board's Regional Director for its 26th Region shall, after being duly signed by Respondents' authorized representatives, including William B. Allen, be posted by Respondents immediately upon receipt thereof and maintained by them for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced,

or covered by any other material. Sufficient copies of said Notices shall also be signed and furnished so that they may be posted by the aforementioned Union in its offices, places of assemblage, and hiring halls in and around the Memphis area, if desired by said Union.

7. Notify said Regional Director in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C., September 24, 1982.

s/STANLEY N. OHLBAUM
Stanley N. Ohlbaum
Administrative Law Judge

FOOTNOTES

1/ William B. Allen and Allen Concrete, Inc. were added as Respondents by amendment of the complaint during trial. The original complaint named "William B. Allen d/b/a Dixie Ready Mix" as Respondent. Thereafter, the amended complaint named "Allcon, Inc." as Respondent.

2/ Charge filed by above Charging Party Union on July 23, amended on August 24 and December 8, 1981, and further amended on May 27, 1982; original complaint dated September 4, 1981; amended complaint dated December 15, 1981, further amended May 6, 1982; third amended complaint, updated, issued pursuant to motion dated May 28, 1982, allowed by my order on notice, answered by Respondents by Answer served on June 15, 1982. The third amended complaint supersedes the previous complaints.

3/ The third amended complaint also alleges that the foregoing corporations constitute a string of related, alter ego, successor, or disguised continuation enterprises of which Respondent William B. Allen has been the principal guiding star. These contentions are dealt with infra.

4/ The saga of that business and related enterprises, as recounted by Allen, dates back to at least 1939, with formation of Allen Ready-Mix (a proprietorship of the Allen family) and S. G. Allen Contractor (also a proprietorship, then his father's business). In 1951, Allen Ready-Mix acquired a sand and gravel

4/ (Contd.) operation, and in 1959 "Allen Block Company" was formed, initially as an Allen family proprietorship and thereafter taking corporate form. In 1960, the foregoing three enterprises were separately incorporated, leaving as an unincorporated proprietorship "S. G. Allen" (or S. G. Allen Company") (consiting of Allen, his mother, and his father) in ownership of the real property. In 1966, Allen started "Allen Materials" as an additional, separate building materials business. In 1972, the three foregoing corporations were merged by Allen into "Allen Materials, Inc.," a new corporation. That corporation thus included not only a concrete-mix business but also a broad-scale building materials business, serving the building contracting and real estate industries, as well as individual building and home owners, and, due in part to a local building boom in Memphis during the 1970s, prospered. At one point, it even added to its ventures a data processing operation, access to which it subleased to various other unaffiliated local business enterprises.

5/ Allen has since leased others, under leases signed by him personally as well as in his capacity as a corporate officer (e.g., GC Exhs. 8,9, & 10). Those trucks are being operated by employees of his same predecessor corporations.

6/ Although, according to the testimony here of Allen, unsecured as well as secured creditors received payment out of the $54,000 raised on the sale of assets, the union (and thus, derivatively, the intended employee "beneficiaries" of the health and welfare and pension

6/ (Contd.) plans under the subsisting collective agreement) received nothing since the reorganization plan contained no provision for payment of obligations to the union pension fund, which by then stood at some $70-90,000.

7/ Initially to Allen's newly formed enterprise "Dixie Ready-Mix Concrete, Inc." (GC Exhs. 5 & 6), which name, however, turned out to be unavailable. Allen also testified to an "Allcon Ready-Mix," adding, "I will be honest with you. I am not sure what the legal and corporate name was."

8/ E. g., the payroll of "Dixie Ready Mix Co." (i.e., Allcon, Inc.) for July-December 1981 includes three persons (Martin, Dye, and Mize(listed as holding jobs constituting rank-and-file jobs under the subsisting collective agreement. All three, however, had been supervisors of Allen Materials, Inc., Debtor-in-Possession.

9/ Without explanation, neither Richardson nor Martin was called to controvert the testimony which follows: nor did Allen.

10/Indeed, the Board has in essence so held as to Section 8(a)(5) and(1), in the related case of Allen Materials, Inc., Debtor-in-Possession, 252 NLRB 1116 (1980), which has neither been appealed nor enforced. That the undisputed statements of Allen to the truckdrivers on or about June 16, as testified to by Sykes, Wiggins, and Merriweather (supra), were also violative of Section 8(a)(3) is likewise not open to doubt.

11/ See, e. g., Johnston Ready Mix, 142 NLRB 437 (1963).

12/ See also, e. g., N.L.R.B. v. Evans Plumbing Co., 639 F. 2d 291 (5th Cir. 1981); SEC v. First Financial Group of Texas, 645 F. 2d 429 (5th Cir. 1981); Commodity Futures Trading Commission v. Incomco, Inc., 649 F. 2d 1_8 (2d Cir. 1981); In re Bel Air Chateau Hospital, Inc., 611 F. 2d 1248 (9th Cir. 1979); In re D. M. Barker, Inc., 13 B.R. 962 (Bkrtcy. Tex. 1981).

13/ I. e., beyond issuance of a remedial order itself.

14/ Respondents also alleged by way of affirmative defense that this proceeding is time-barred under Section 10(b) of the Act. That contention is unsound, since the cited section requires only that the alleged unfair labor practices not predate by more than six months the filing of a charge--a requirement clearly met here, particularly since the refusal to bargain is a continuing one. It is also well-settled that a charge, or an original complaint, may be brought up to date and added to so, so as to encompass additional matters uncovered by the Regional Director's investigation and General Counsel's preparation for trial. See N.L.R.B. v. Fant Milling Co., 360 U. S. 301 U. S. 301 (1959); National Licorice Co. v. N.L.R.B., 309 U. S. 350, 367-69 (1940); N.L.R.B. v. Allis-Chalmers Corp., 563 F. 2d 674, 676 (5th Cir. 1977), N.L.R.B. v. Jack LaLanne Management Corp., 539 F. 2d 292, 294-95 (2d Cir. 1976); N.L.R.B.

14/ (Contd.) v. Braswell Motor Freight Lines, Inc., 486 F. 2d 743, 746 (7th Cir. 1964); N.L.R.B. v. Kohler Company,, 220 F. 2d 3, 6-8 (7th Cir. 1955); Wayne Electric, Inc., 226 NLRB 409, 415-16 (1976); North Country Motors, Ltd., 133 NLRB 1479 (1961); Dal-Tex Optical Company, Inc. 130 NLRB 1313 (1961). Respondent's said affirmative defense is accordingly dismissed.

15/ A. J. Krajewski Mfg. Co., 180 NLRB 1071 (1970).

16/ Cf., e. g., N.L.R.B. v. Entwistle Mfg. Co., 120 F. 2d 532, 536 (4th Cir. 1941).

17/ For a more complete exposition of the rationale for and cases supporting the inclusion of William B. Allen in the remedy here, see p. 11 supra

18/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order which follows herein shall, as provided in Section 102.48 of those Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

19/ In the event this Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WILLIAM B. ALLEN,

ALLCON, INC., AND ALLEN

CONCRETE, INC.,

and Case 26-CA-9219

TEAMSTERS LOCAL UNION NO. 984,

AFFILIATE OF THE INTERNATIONAL

BROTHERHOOD OF TEAMSTERS,

CHAUFFEURS, WAREHOUSEMEN AND

HELPERS OF AMERICA

DECISION AND ORDER

On September, 1982 Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, the Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National

Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, 1/ and conclusions 2/ of the Administrative Law Judge and to adopt his recommended Order, 3/ as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified and stated in full below and hereby orders that the Respondents, William B. Allen, Allcon, Inc., and Allen Concrete, Inc., Memphis, Tennessee, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Informing employees that the

business operations of any of the Respondents, or of any alter ego or successor to any of the Respondents, will be conducted on a nonunion basis; or that employees continuing in any such employ would be permitted to do so only on a nonunion basis.

(b) Failing and refusing to adhere to and apply the terms and provisions of the collective-bargaining agreement made and entered into on 31 March 1980 for a period of 3 years, from 1 March 1980 to 1 March 1983 by and between Teamsters Local Union No. 984, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Allen Materials Company, including, but not limited to, the provisiions thereof requiring payment of health and welfare and pension benefits.

(c) Failing or refusing to recognize and bargain collectively in good faith with the aforementioned Union as the exclusive bargaining representative of the employees in the following appropriate collective-

bargaining unit:

> All production and maintenance employees at Respondents' Memphis, Tennessee, facility (currently located at 7810 Moriarity Road, East Memphis, but also all other locations in or around Memphis, Tennessee, to which it may be removed or expanded), excluding all office and clerical employees, watchmen, guards, professional employees, technical employees, and supervisors as defined in the Act.

(d) Forming, creating, or utilizing any business enterprise, in corporate or other form, to which any property or good-will in any form is transferred or shifted, or otherwise for the purpose of attempting to evade or avoid the Employer's obligations under the aforementioned collective-bargaining agreement, or to attempt to defeat, impair, or render burdensome the

the enjoyment and enforcement of the rights of said unit employees or their collective-bargaining representative thereunder.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their right of self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Upon request, bargain in good faith with said Union as such exclusive bargaining representative, retroactively, as of the date when the Respondents or any of them, ceased, failed, or refused to recognize or continue to recognize and bargain with said Union; and, if requested,

embody in a signed agreement or agreements any understanding reached.

(b) Apply the provisions, terms, and conditions of the collective-bargaining agreement effective 1 March 1980 through 1 March 1983, retroactively as aforesaid (except to the extent it may be duly modified by valid written agreement with said Union), make whole all members of the aforesaid bargaining unit for all sums and benefits (including reimbursement for any medical or other expenditures incurred by reason of any discontinued premiums or payments)due thereunder, including but not limited to health and welfare and pension fund payments and contributions stipulated thereunder, computed in the manner described in the ''Remedy'' portion of the attached Decision.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all corporate and personal books, records, entries, and papers

of whatever description, all payroll records, job records, social security payment records, timecards, personnel records and reports, accounts receivable records, checkbooks, checkstubs, bank statements, tax records, leases, deeds, bills of sale and all other records, documents, and entries necessary or useful to determine any sums, payments, or benefits due under, and the extent of compliance with, the terms of this Order.

(d) Post at their premises at 7810 Moriarity Road, Est Memphis, Tennessee (as well as at any and all other premises in the Memphis and nearby area at or from which they may be doing business), copies of the attached notice marked ''Appendix.''4/ Copies of said notice, on forms provided by the Board's Regional Director for Region 26 shall, after being duly signed by the Respondents' authorized representatives, including William B. Allen, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60

consecutive days thereafter, in conspicuous places, including all places here notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D. C. 26 August 1983.

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

FOOTNOTES

1/ The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Respondents except to the Administrative Law Judge's finding that they met the Board's jurisdictional standards. The record, however, indicates that during the 6 months of its existence, Respondent Allcon, Inc., did approximately $150,000 worth of business with Dick Corporation, which purchased more than $50,000 worth of cement manufactured outside the State of Tennessee. Accordingly, we find that Respondent Allcon, Inc., met the Board's indirect inflow jurisdictional standards. See, e.g., Bridge and Structural Iron Workers Local No. 1, International Association of Bridge, Structural and Ornamental Iron Workers, AFL--CIO (Duane Majeske d/b/a Colt Construction Co.), 245 NLRB 132 (1979). The record further establishes that Respondent Allen Concrete, Inc., purchased $1,000 worth of cement manufactured outside the State of Tennessee per week and leased trucks for $2,000 a month from outside the State. Projecting these figures on an annual basis, we find that Allen Concrete, Inc., satisfied the Board's direct inflow jurisdictional

1/ (Contd.) requirement.

2/ The Administrative Law Judge, in fn. 8 of his Decision, stated that the payroll records of ''Dixie Ready-Mix Co.'' listed former supervisors of Allen Materials, Inc., Debtor-in-Possession, Martin, Dye, and Mize as holding rank-and-file jobs. The records, however, do not designate what jobs they held.

There is also no evidence to substantiate the Administrative Law Judge's statement that the business the partnership of William Allen, Earl Mize, and E. L. Dye did with Allen Concrete, Inc., involved ''very substantial'' amounts of money.

Further, the Administrative Law Judge, in fn. 10 of his Decision, erroneously stated that Allen's 26 June conversation with the truckdrivers occurred on or about 16 June and that the conversation violated Sec. 8(a)(3) rather than Sec. 8(a)(1).

3/ In adopting the Aministrative Law Judge's recommendation to issued a broad cease-and-desist order requiring the Respondents to cease and desist from violating the Act''in any other manner,'' we do not rely on his citation of N.L.R.B. v. Entwistle Mfg. Co., 120 F. 2d 532 (4th Cir. 1941). Rather, we find a broad cease-and-desist order to be appropriate because the Respondents have a propensity to violate the Act. See Hickmott Foods, Inc., 242 NLRB 1357 (1979).

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest

3/ (Contd.) at a fixed rate on unlawfully withheld fund payments. Merryweather Optical Company, 240 NLRB 1213 (1979). Accordingly, we shall modify the Administrative Law Judge's recommended Order and notice to delete the provision adding interest to fund payments.

4/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-700

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM B. ALLEN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner was the "alter ego" of a predecessor employer and therefore violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3) and (5), by refusing to assume the collective bargaining obligations of that employer, to apply the terms of an existing collective bargaining agreement to bargaining unit employees, and to continue making payments to various employee benefit funds.

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§ 8(a)(1), 29 U.S.C. 158(a)(1) 5

§ 8(a)(3), 29 U.S.C. 158(a)(3) 5

§ 8(a)(5), 29 U.S.C. 158(a)(5) 5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-700

WILLIAM B. ALLEN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 758 F.2d 1145. The decision and order of the National Labor Relations Board (Pet. App. 59-69) and the decision of the administrative law judge (Pet. App. 12-58) are reported at 267 N.L.R.B. 700.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1985. A petition for rehearing was denied on June 18, 1985 (Pet. App. 7-8). On August 21, 1985, Justice O'Connor extended the time within which to file a petition for writ of certiorari to and including October 1, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Labor Relations Board (the Board) found that petitioner's current firm was the alter ego of a series of predecessor companies and that petitioner had violated the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, in several ways by failing to satisfy the collective bargaining obligations of the predecessor businesses (Pet. App. 68-77). The court of appeals affirmed (*id.* at 1-5).

1. Petitioner William B. Allen was the president and general manager of Allen Materials, Inc. (AMI), a concrete and building supply business that had been incorporated in 1972 by petitioner's father as part of a merger of his father's pre-existing businesses. After the death of petitioner's father, AMI's stock was held by petitioner, his mother, and his four sons. The employees working in the ready-mix concrete part of the business were represented by General Drivers, Salesmen and Warehousemen Local 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Union) pursuant to a series of collective-bargaining agreements between the Union and AMI. Pet. App. 1-2, 17, 54-55 n.4.

On February 1, 1978, AMI filed for reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. (1976 ed.) 501 *et seq.* The business was thereafter carried on as Allen Materials, Inc., Debtor-in-Possession (AMIDIP). Petitioner continued as its president and general manager. AMIDIP continued to observe the collective bargaining agreement that was in effect between AMI and the Union. Subsequently, while AMIDIP was in reorganization, petitioner and the Union entered into another collective bargaining agreement that was effective from March 1, 1980, to March 1, 1983. As part of the reorganization, AMIDIP sold off its concrete block plant, its data processing operation, its building materials inventory, most of its trucks, and its

warehouse to the point that by November 30, 1980, AMDIP's operations consisted solely of the sale and delivery of ready-mix concrete to six customers. In June 1981, the Union Planters National Bank of Memphis, having obtained leave of the bankruptcy court, foreclosed on mortgages covering all of the assets of AMIDIP, which ceased operations on about June 23. Pet. App. 17-18; Tr. 92-93, 161, 165, 166, 183, 200-201, 285-286.

On June 26, 1981, petitioner called a meeting of the seven drivers then working for AMIDIP. He told the drivers that the company was bankrupt, that it was " 'going to be up under another name,' " and that it would henceforth operate as a " 'non-union' " company (Pet. App. 26 (citation omitted)). Petitioner also told the drivers that he would need five drivers at the outset, that he expected that he would ultimately need ten drivers, and that he would honor existing seniority status, but that there would be " 'no pensions' " and that he " 'want[ed] no parts [*sic*] of the Union anymore' " (*id.* at 26-27 (citations omitted); see *id.* at 2).

On July 1, 1981, petitioner chartered Allcon, Inc. (Allcon), to engage in the production, sale, and delivery of ready-mix concrete, building materials, concrete blocks, sand and gravel, and to offer data processing services—the same line of business that AMIDIP, AMI, and their predecessors had engaged in. From then until early 1982—when, as a result of a lien for unpaid taxes obtained by the Internal Revenue Service (IRS), it ceased operations—Allcon produced and delivered ready-mix concrete. Petitioner ran Allcon as its president and general manager; Allcon had no corporate books, minutes, or stockholders and officers other than petitioner. Allcon produced concrete using a plant that previously had been owned by AMIDIP and AMI, and delivered the concrete, using six leased trucks—two of which previously had been leased by AMIDIP—to six customers, all of whom previously had been customers of AMIDIP. Allcon's supervisors, secretary-bookkeeper,

and drivers all had held the same positions with AMIDIP. Drivers received the same wages that they had received from AMIDIP. Allcon did not recognize the Union or abide by the AMIDIP-Union collective bargaining agreement with respect to its drivers. In particular, Allcon did not make contractually required fringe and benefit payments on behalf of its drivers to employee benefit funds. Pet. App. 2-3, 19-23, 41.

Following Allcon's cessation of business in early 1982 as the result of the IRS lien, petitioner incorporated Allen Concrete, Inc. (ACI) " 'to make, produce, process, transport, package, store, buy and sell ready-mix concrete, building materials, concrete blocks, sand and gravel' " and to carry out related activities (Pet. App. 3 (citation omitted)). Like Allcon, ACI had no officers, stock, corporate minutes, books or records, or documents of ownership. Petitioner was ACI's general manager. ACI operated out of the same business address and plant as had Allcon. Many of ACI's customers also had been customers of Allcon; in addition, ACI sold concrete to "Allen Construction," a partnership consisting of petitioner and two individuals who were former supervisors of Allcon and AMIDIP. ACI, as did Allcon, used leased trucks to make its deliveries. ACI's drivers previously had worked for Allcon and AMIDIP. ACI did not recognize the Union, abide by the collective bargaining agreement, or make the contractual fringe and benefit payments on behalf of its drivers. Pet. App. 3, 19-22, 41.

2. Adopting the opinion of the administrative law judge (Pet. App. 60), the Board found that petitioner "continues to be the common strand, linchpin, principal, operator, and guiding star of the business * * * in question; and, although that business has, after its expansion, undergone a contraction to its earlier proportion, it continues to be a ready-mix concrete business, conducted in the same manner, at one of its same locations, under the same supervision, with the

same unit employees and customers—although, to be sure, not as many [—] * * * [a]ll * * * without hiatus in operations" (Pet. App. 31). The Board also found that petitioner "has, without hiatus in operations, formed a succession of corporations under the same ownership, management, and, in part, location, employees, and customers as [AMI] and * * * [AMIDIP], with the avowed purpose and intention * * * of operating 'non-union' and thereby attempting to evade or avoid the obligations of the subsisting collective agreement" (*id.* at 33-34).

Based on those findings, the Board held that petitioner—as well as Allcon and ACI—violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by informing his employees on June 26, 1981, that all future operations would be performed on a non-union basis and that employees could continue to work for him only on that basis, and by operating on a non-union basis after that date (Pet. App. 42, 68 n.2). The Board also concluded that petitioner, Allcon, and ACI violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by refusing to make payments to employee benefit plans as required by the existing collective bargaining agreement (Pet. App. 42-43). Finally, the Board concluded that petitioner Allcon, and ACI also violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by refusing to recognize and bargain with the Union, by repudiating the existing collective bargaining agreement, and by refusing to make payments to employee benefit funds as required by that agreement (Pet. App. 43-44).[1]

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[1]The Board's order requires petitioner, Allcon, and ACI to cease and desist from the above-described unfair labor practices and from interfering with employees' exercise of their rights under Section 7 of the Act, 29 U.S.C. 157. Petitioner, Allcon, and ACI were also required, upon request, to bargain with the Union retroactively to the date upon which any one of them had failed to recognize the Union; if requested, to embody any understanding in a signed agreement; retroactively to

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1-5). The court concluded (*id.* at 4-5) that substantial evidence supported the Board's finding that petitioner was an alter ego of AMIDIP within the meaning of *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100 (1942).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no legal issue of general importance. Accordingly, review by this Court of petitioner's fact-bound claims is not warranted.

It is well-settled that where an employer is a party to a collective bargaining agreement, ceases doing business in one form, and re-establishes itself in another, the latter, if found to be simply the "alter ego" of the former, must continue to recognize the union and honor the terms of the collective bargaining agreement. See *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel Employees International Union*, 417 U.S. 249, 259 n.5 (1974); *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100 (1942). The determination whether one firm is the alter ego of another requires an assessment of a variety of factors, such as whether the two enterprises have a substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. See, *e.g.*, *Goodman Piping Products, Inc.* v. *NLRB*, 741 F.2d 10, 11 (2d Cir. 1984); *NLRB* v. *Campbell-Harris Elec. Co.*, 719 F.2d 292, 295 (8th Cir. 1983); *J.M. Tanaka Constr., Inc.* v. *NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982); *Nelson Electric*

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apply (except to the extent modified by agreement with the Union) the terms and conditions of the March 1980-March 1983 agreement; fully to compensate employees for any losses they suffered as a result of the unfair labor practices; and to post appropriate notices to this effect. Pet. App. 47-53, 60-66, 68-69 nn.3-4.

v. *NLRB,* 638 F.2d 965, 968 (6th Cir. 1981); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144, 1144 (1976). The ultimate issue is a question of fact (*Southport Petroleum Co.,* 315 U.S. at 106; *Goodman Piping Products, Inc.*, 741 F.2d at 11; *NLRB* v. *Al Bryant, Inc.,* 711 F.2d 543, 551 (3d Cir. 1983), cert. denied, 464 U.S. 1039 (1984)), and the Board's finding must be upheld if there is substantial evidence to support it (*Goodman Piping Products, Inc.*, 741 F.2d at 11; *J.M. Tanaka Constr., Inc.,* 675 F.2d at 1033; see *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488 (1951)).

Petitioner does not take issue with these principles; rather, he contends (Pet. 17-29) that the evidence does not support the Board's finding that AMIDIP, Allcon, and ACI were one and the same. However, the Board found that ACI was the alter ego of the predecessor businesses, and the court of appeals saw no reason to disturb that finding (see Pet. App. 4). Given these findings by the Board and the court of appeals, review by this Court of petitioner's fact-bound claim is not warranted. See, *e.g., United States* v. *Doe,* 465 U.S. 605, 613-614 (1984). In any event, as shown above (pages 2-4), the evidence amply supports the Board's alter ego finding.[2]

Petitioner claims (Pet. 14-17) that an alter ego finding cannot be made in this case because AMIDIP went out of business as a result of bankruptcy proceedings. To the

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[2]Petitioner's comparison (Pet. 20-24) between AMI and Allcon overlooks the fact that seven months prior to its foreclosure AMIDIP had been reduced to a small ready-mix concrete supplier serving only six customers. The Board properly took that diminution into consideration and, accordingly, properly compared AMIDIP's operations as they stood in 1981 to those of Allcon for the purpose of assessing continuity. Moreover, the diminution in the scope of an enterprise is not inconsistent with the existence of an alter ego relationship between the pre- and post-foreclosure entities. See, *e.g., J.M. Tanaka Constr., Inc.*, 675 F.2d at 1034.

extent that petitioner claims (*id.* at 15) that an alter ego finding requires proof of an intent to evade existing obligations under a collective bargaining agreement, petitioner's claim is not supported by *Southport Petroleum Co.* v. *NLRB, supra,* on which petitioner relies (Pet. 12-14).[3] A new firm can be the alter ego of a former company where the new firm is established solely for the purpose of continuing operations while ridding itself of a union or where an economically motivated closing of a company is seized upon as an opportunity " 'to shake the union' " (*NLRB* v. *Lewis,* 246 F.2d 886, 888 (9th Cir. 1957); see *Goodman Piping Products, Inc.*, 741 F.2d at 11-12 (anti-union animus not necessary for an alter ego finding); *NLRB* v. *Trico Products, Inc.*, 636 F.2d 266, 270-271 (10th Cir. 1980)). In this case, the Board found that petitioner used the closing of AMIDIP to eliminate the Union, and that factual finding does not warrant review by this Court.[4]

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[3]In *Southport Petroleum,* this Court described the alter ego inquiry as involving the determination "[w]hether there was a *bona fide* discontinuance and a true change of ownership * * * or merely a disguised continuance of the old employer," which is "a question of fact properly to be resolved by the Board" (315 U.S. at 106). Thus, where there is either no "*bona fide* discontinuance" or no "true change of ownership" the Board is entitled to find that the new firm is simply the alter ego of the old one. In this case, the board found that there was no "true change of ownership" from AMIDIP to Allcon to ACI, and the court of appeals upheld that finding on the ground that it was supported by substantial evidence. Petitioner's assertion (Pet. 14-15) that *Southport Petroleum* requires an intent to evade labor obligations is erroneous. See *Howard Johnson Co.*, 417 U.S. at 259 n.5 (emphasis added) (noting that alter ego relationships "*frequently* [are accomplished] to avoid the effect of the labor laws"); *Goodman Piping Products, Inc.*, 741 F.3d at 11-12 (anti-union animus not necessary for an alter ego finding).

[4]Petitioner errs in claiming (Pet. 14-15) that *NLRB* v. *Herman Bros. Pet Supply, Inc.*, 325 F.2d 68 (6th Cir. 1963), forbids the Board from making an alter ego finding in the absence of proof that a business change was done for the purpose of evading existing labor obligations. There, the court upheld the Board's finding that an employer closed one

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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business and opened another for that purpose, but the court did not hold that such intent is necessary for an alter ego finding. In any event, any alleged intracircuit conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).